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SUPREME COURT, U.S.

No. 05-1384

IN THE

Supreme Court of the United States

KATHLEEN A SHEFCHUK, as Executrix of the Estate of GREGORY D. SHEFCHUK,
Petitioner,

v.

ILLINOIS UNION INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court should review the clear judgment of the Court of Appeals for the Sixth Circuit because the Petitioner interprets portions of the opinion to be inconsistent with the judgment.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Illinois Union Insurance Company ("Illinois Union") concurs with Petitioner's description of the parties to the proceeding provided in the Petition for Writ of Certiorari.

Pursuant to Supreme Court Rule 29.6, Illinois Union states that it is a wholly owned subsidiary of ACE Limited, which is publicly owned.

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BRIEF IN OPPOSITION

Respondent Illinois Union Insurance Company respectfully requests that this Court deny the Petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Ohio residents who had purchased mutual funds and other financial products from financial advisers Gregory Shefchuk and Robert Shefchuk sued for investment losses caused by the Shefchuks' misdeeds and mismanagement of the customers' investments. In approximately two dozen lawsuits, numerous Ohio customers alleged that Robert and Gregory

Shefchuk had intentionally defrauded them and stolen their funds. Soon after the lawsuits were filed, Gregory Shefchuk committed suicide.

A. Proceedings Before the United States District Court for the Northern District of Ohio

In response to the individual lawsuits by the customers, Petitioner, as Executrix of Gregory Shefchuk's Estate, sought coverage under professional liability insurance policies which had been issued by Illinois Union Insurance Company ("Illinois Union") and which named Robert and Gregory Shefchuk as insureds. The policies excluded from coverage claims arising out of "wrongful acts" which are dishonest, fraudulent, criminal, malicious or knowingly wrongful as well as claims arising out of the insured gaining any personal profit or advantage to which the insured is not legally entitled. After determining that the insureds' wrongful acts were excluded from the scope of policy coverage, Illinois Union brought a declaratory judgment action in the United States District Court for the Northern District of Ohio, seeking a determination that it had no duty to defend or indemnify Robert and Gregory Shefchuk under the terms of the policies.

Illinois Union contended that the underlying claims by customers of Robert and Gregory Shefchuk alleged conduct which fell outside of coverage such that there was no set of facts based on the allegations in the underlying complaints which demonstrated a potentially covered claim. In addition, even if the alleged conduct fell within the scope of coverage, the claims were excluded from coverage by the policy exclusions for dishonest, fraudulent, criminal, malicious or knowingly wrongful conduct and for actions taken to gain a personal profit or advantage to which the insured is not legally entitled. The district court agreed with Illinois Union's legal arguments and granted Illinois Union summary judgment.

B. Petitioner's Appeal to the Sixth Circuit Court of Appeals

Petitioner appealed on the grounds that the district court purportedly erred by relying upon allegations in the underlying actions by the insureds' customers without determining whether there was any evidence from which it could be determined if the allegations in the customers' complaints were true. Petitioner alleged that in the absence of evidence that the allegations of the customers were true, there was still the potential of coverage and, thus, a duty to defend.

The Sixth Circuit began its *de novo* review and analysis of the district court's judgment by noting that it disagreed with Petitioner's argument that the truth of the customers' allegations must be proven to negate a duty to defend:

> As a preliminary matter, we reject the argument advanced by both Robert Shefchuk and the estate that the exclusionary clauses in the Illinois Union policy do not come into effect unless the excluded acts relied upon by the insurer to deny coverage are actually proven, rather than merely alleged in the underlying actions.

(Petition Appendix, p. 17a). The Sixth Circuit summarized Ohio insurance law regarding the duty to indemnify and the duty to defend as follows:

> The question thus becomes whether, in the underlying actions at issue, there was a potential that the insurance company would have to pay damages. If there was such a possibility, then the allegations stated a claim that was potentially within the policy's coverage; if there was no such possibility, the allegations did not state a claim potentially within the policy's coverage and there was no duty to defend.

(Petition, p. 18a). As evidenced by the Sixth Circuit's discussion of the underlying actions, the Sixth Circuit reviewed the complaints to determine whether any set of facts in the

complaints could possibly lead to a finding of coverage. The Sixth Circuit then affirmed the district court's grant of summary judgment to Illinois Union with respect to its duties to the Estate of Gregory Shefchuk. Accordingly, the Sixth Circuit's opinion and judgment are not at odds because the complaints from the underlying actions revealed that there was no set of facts in the complaints that could possibly lead to a finding of coverage. Therefore, the Sixth Circuit deemed a remand to the district court unnecessary to resolve the case.

C. Petitioner's Petition for Panel Rehearing By the Sixth Circuit Court of Appeals

Petitioner filed a Petition for Panel Rehearing with the Sixth Circuit not because she disagreed with the Sixth Circuit's interpretation of Ohio law but because Petitioner alleged that the Sixth Circuit's opinion had misstated statements made by counsel during the oral argument before the Sixth Circuit. The Sixth Circuit responded by removing from its *opinion* the two sentences challenged by Petitioner and denying the petition for rehearing. Therefore, the *judgment* of the Sixth Circuit, affirming the district court's decision with respect to the Estate, remained intact.

D. Petitioner's Motion for Reconsideration By the Sixth Circuit Court of Appeals

Petitioner then filed the Motion of Defendant-Appellant Kathleen A. Shefchuk, Executrix (1) for Reconsideration, Clarification and/or Correction of Order of November 30, 2005, Denying Petition for Rehearing, but Amending Order of August 17, 2004, and/or (2) for Recall of Mandate and Correction or Clarification of Same to Conform to Amendment of Opinion ("Motion for Reconsideration") asking the Sixth Circuit to reconsider its judgment affirming the district court and to clarify or correct the *judgment* to "conform" to the Sixth Circuit's *opinion*. This Motion for Reconsideration remains pending before the Sixth Circuit.

REASONS FOR DENYING THE PETITION

While not providing an exhaustive list, Supreme Court Rule 10 lists reasons the Court may grant a petition for a writ of certiorari. Rule 10 suggests that review on certiorari may be granted if (1) there is a split of authority among the United States court of appeals or between a United States court of appeals and a state court of last resort; (2) a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; (3) a state court of last resort's holding is at odds on an important federal question with a decision by a United States court of appeals or another state court of last resort; or (4) another court has decided an important question of federal law which should be settled by this Court, or has decided an important federal question in a manner that conflicts with this Court's decisions. S. Ct. Rule 10. Rule 10 then states, "[a] petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts that review on certiorari should be granted because the Sixth Circuit has purportedly entered a decision in her case which is inconsistent with the Sixth Circuit's opinion. Not only does this reason proferred for granting Petitioner's writ of certiorari fall outside the list of reasons provided in Rule 10 for granting a writ of certiorari, this reason falls squarely within the description in Rule 10 of a case in which a writ of certiorari is "rarely granted."

I. THE SIXTH CIRCUIT'S JUDGMENT DOES NOT RAISE ANY OF THE REASONS LISTED IN SUPREME COURT RULE 10 AS WARRANTING THIS COURT'S ATTENTION

Petitioner does not allege that the Sixth Circuit has misstated Ohio insurance law regarding duties of the insurer to indemnify and defend its insured. Thus, Petitioner is not alleging that the Sixth Circuit has entered a decision regarding Ohio insurance coverage law in conflict with the decision of another United States court of appeals or with a decision by a state court of last resort. Nor does Petitioner allege that the Sixth Circuit has decided an important question of federal law which should be settled by this Court or has decided an important question of federal law in a way that conflicts with this Court's relevant decisions. Indeed, Petitioner explains that while the controversy involved questions of Ohio insurance coverage law, "[t]he merits of Ohio insurance coverage law is not what would be at issue on the review on Writ of Certiorari sought by Petitioner." (Petition, p. 3).

Instead, Petitioner contends that this Court should grant review because the Sixth Circuit has purportedly 'so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power.' (Petition, p. 11). Petitioner apparently reads the Sixth Circuit's per curiam opinion in such a manner as to be at odds with its decision. According to Petitioner, the fact that she reads the opinion and judgment to be inconsistent must mean that the Sixth Circuit is engaging in "extreme result-oriented 'judicial activism.'" (Petition, p. 13).

However, it is a well-established principle of law that if a court's judgment and opinion appear to be at odds, the judgment controls. *Eakin v. Continental Illinois Nat'l Bank and Trust Co. of Chicago*, 875 F.2d 114, 118 (7th Cir. 1989) ("In the event of a conflict between the opinion and the judgment,

the judgment controls."); *Pratt v. Pratt*, 99 Wash.2d 905, 910, 665 P.2d 400, 403 (1983) ('The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions.') (quoting *Tiedman v. Tiedman*, 400 Mich. 571, 576, 255 N.W.2d 632 (1977)); *Joslin v. Fourteenth District Judge*, 76 Mich. App. 90, 96, 255 N.W.2d 782, 785 (1977) ("a court speaks through its orders, not its opinions") (citations omitted); *In re Yorba's Estate*, 176 Cal. 166, 170, 167 P. 854, 856 (1917) ("An 'opinion' is the informal expression of the views of the court, and cannot prevail against its final order or decision.") (citations omitted).

Indeed, it is deemed perfectly acceptable in most cases for a court to render a decision without even offering an opinion to explain its reasoning. *See, e.g. Wright v. Secretary for the Dept. of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002) ("A judicial decision and a judicial opinion are not the same thing. The chief responsibility of judges is to decide the case before them. They may, or may not, attempt to explain the decision in an opinion.").

Just because a party believes the opinion and judgment do not match, it does not follow that the party may seek nullification of the judgment on the ground that it conflicts with the opinion. "The appellate department is not required to write an opinion giving its reasons for a decision. An opinion may shed light on the decision where the decision is unclear but the opinion will not be looked to in order to nullify the decisions or judgment." *Ernst v. Municipal Court of California, County of Los Angeles, Long Beach Judicial Dist.*, 104 Cal.App.3d 710, 163 Cal.Rptr. 861 (Ct. App. 2d Dist. 1980).

In other words, even if the Sixth Circuit's opinion were to be at odds with its judgment, such circumstances do not constitute a departure from the accepted and usual course of judicial proceedings warranting review by this Court. The

well-established rule is that if a conflict exists between the judgment and the opinion, clarification of the opinion or judgment is unnecessary; the judgment controls. If that judgment is at odds with the holdings of another court and raises an important question of federal law, then the judgment *might* raise a question warranting review on certiorari. However, Petitioner has not sought review of a judgment that raises an important question of federal law that conflicts with the holdings of another court. Thus, the Sixth Circuit's judgment does not raise any of the issues listed in Rule 10 as warranting this Court's attention.

II. THE PETITION RAISES THE VERY ISSUE THAT SUPREME COURT RULE 10 STATES IS RARELY SUFFICIENT GROUNDS FOR GRANTING A PETITION

As stated in Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consist of . . . the misapplication of a properly stated rule of law." S. Ct. Rule 10. Through both her Motion for Reconsideration, now pending before the Sixth Circuit, and in her Petition before this Court, Petitioner is requesting correction of the Sixth Circuit's *judgment* to make it conform to her reading of the Sixth Circuit's *opinion*. In other words, the misapplication of a properly stated rule of law is precisely the error which Petitioner claims the Sixth Circuit Court committed: "the Court of Appeals' disposition on the case flatly contradicts its determination of the merits of the case." (Petition, p. 10).

III. THE PETITION FOR WRIT OF CERTIORARI IS PREMATURE

As Petitioner acknowledges, her Motion for Reconsideration remains pending before the Sixth Circuit. (Petition, p. 8). Accordingly, it would be premature for this Court to grant certiorari on an issue that could be rendered moot by a ruling of the Sixth Circuit.

IV. THE PETITION FOR WRIT OF CERTIORARI DOES NOT RAISE A QUESTION OF PUBLIC IMPORTANCE

Petitioner claims that her case is worthy of review on certiorari because she believes the Sixth Circuit has engaged in judicial activism by rendering a results-oriented judgment and not publishing its opinion and judgment. According to Petitioner, her case provides the Supreme Court with the opportunity to become involved in the academic debate now surrounding unpublished opinions and the concept of judicial activism. However, the Supreme Court does not sit to resolve academic debates. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that the Supreme Court "does not sit to satisfy a scholarly interest").

Moreover, this case would not even be a proper case for weighing in on the academic debates regarding unpublished opinions and judicial activism because there is no reason, beyond Petitioner's unsupported claim, for believing that the Sixth Circuit has engaged in judicial activism by rendering an unpublished decision in her case. As noted in Petitioner's direct quotation of an article regarding unpublished opinions, the federal courts choose to decide approximately 80% of their cases through unpublished opinions. (Petition, p. 12). As explained by the Ninth Circuit:

> [Not publishing a decision] does not mean it is not fully considered or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.

Hart v. Massanari, 266 F.3d 1155, 1177-78 (9th Cir. 2001). Petitioner's belief that the Sixth Circuit has not adequately explained its rationale for affirming the district court does not

provide adequate grounds for accusing the Sixth Circuit of "extreme result-oriented 'judicial activism.'"

Indeed, it appears that Petitioner has merely raised the issue of judicial activism to try to persuade this Court to take a case which would do nothing more than address her individualized dispute with Illinois Union. Petitioner is asking this Court to nullify the judgment of the Sixth Circuit in her case because she believes the opinion is not consistent with the judgment. If this Court granted review on certiorari, it would merely be deciding whether the Sixth Circuit's judgment should be nullified in light of its opinion. Such involvement by the Supreme Court would establish no general rule of law to guide the lower courts in future cases. The decision would simply set the precedent that litigants may seek Supreme Court review in order to nullify a judgment they are dissatisfied with if they can find any language within the lower court's opinion which could arguably leave the rationale behind the lower court's judgment unclear.

The Supreme Court 'does not sit to adjudicate individual disputes; that is the business of the district courts and courts of appeal. Rather it uses individual cases and controversies to shape and guide the development of the law.' *Cowin v. Bresler*, 741 F.2d 410, 425 (D.C. Cir. 1984) (citations omitted); *see also Rice*, 349 U.S. at 74 (stating that the Supreme Court does not "sit for the benefit of the particular litigants") (citation omitted). As explained by the Court in *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923):

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this

> Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

Id. at 163. The Petition fails to raise any issues of sufficient importance to justify review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

This 5th day of July, 2006.

Respectfully submitted,

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